Dato' Seri Anwar bin Ibrahim v Public Prosecutor

FEDERAL COURT (MALAYSIA) — CRIMINAL APPEAL NO 05–4 OF 2000 (W)
ABDUL MALEK AHMAD PCA, SITI NORMA YAAKOB AND ALAUDDIN FCJJ
15 SEPTEMBER 2004

Constitutional Law — Courts — Federal Court — Inherent powers of court — Whether Federal Court has jurisdiction to reopen and review matter — Rules of the Federal Court 1995 r 137 — Effect of r 137

Criminal Procedure — Appeal — Evidence — New evidence not available at trial — Criteria of new evidence — When could new evidence be adduced — Whether exceptional circumstance or fraud or suppression exists — Whether tantamount to an attempt to relitigate issues which has been otherwise conclusively settled

Criminal Procedure — Judgment — Double judgment — Two separate judgments on two separate issues — Whether judgments represent judgment of court — Whether s 94(2) of Courts of Judicature Act 1964 an impingement to judicial independence — Effect of s 94

The applicant filed four motions. The first motion vide encl 80(a) was for an order that the court invoked its inherent powers under r 137 of the Rules of the Federal Court 1995 ('the RFC') to set aside the convictions and sentences of the applicant that were confirmed and upheld by the Federal Court on 10 July 2002. The second motion at encl 89(a), the applicant prayed for an order that the court invoke its inherent powers under r 137 of the RFC to allow fresh or additional evidence affecting the trial to be adduced as such evidence was not available during the trial.

The third and fourth motions by encls 97(a) and 124(a), was for an order that he be given leave to rely on additional grounds at the hearing of his encl 80(a). The additional grounds included the assertion that s 94(2) of the Courts of Judicature Act 1964 ('the CJA') was unconstitutional and void, and of no effect as it impinged on the judicial independence of judges.

At the commencement of the proceedings, the respondent raised a preliminary objection on the first motion that the court did not have the necessary jurisdiction either in law or under common law to relitigate on such appeals.

Held, dismissing the applications:

(1) (per **Abdul Malek Ahmad PCA**) The Federal Court has the jurisdiction to hear an application under r 137 of the RFC where it was found necessary to prevent injustice or to prevent an abuse of the process of the court (see para 44).

(2) (per **Abdul Malek Ahmad PCA**) Under r 137 of the RFC, the Federal Court has the jurisdiction and power to reopen and review any matter already decided by the court if there was allegation of injustice or abuse of the process of the court. Clause 2(c) of art 121 of the FC provides 'such other jurisdiction as may be conferred by or under Federal law'. Consequently, para (b) of the definition of 'Federal law' at cl (2) of art 160

of the FC only applies to any Act of Parliament. This includes the RFC, being a subsidiary legislation of the relevant Act of Parliament, namely the Courts of Judicature Act. By virtue of ss 16 and 17 of the CJA, the rules could be made for the practice and procedure where the courts have jurisdiction (see paras 45 and 46).

(3) (per **Alauddin FCJ**) On the facts, the new evidence submitted by the applicant in para 17 of encl 89(a) was not evidence that was not available at the trial. It was available at during the trial and the trial judge had dismissed the evidence as being irrelevant. As the evidence had no relevance to the charges faced by the applicant, it could not materially affect the result of the case. Therefore, the evidence did not qualify as new or additional evidence (see paras 82 and 83).

(4) (per **Alauddin FCJ**) There was no exceptional circumstance, no fraud or suppression of evidence and neither was there new evidence before the court which merited the court to reopen or rehear the case (see para 88).

(5) (per **Alauddin FCJ**) The contempt proceedings was a separate proceedings. There was no nexus between the allegation of fabrication and the corruption appeal. The findings and observations in the Federal Court pertaining to the contempt proceedings had no bearing at all on the corruption charges. By introducing new grounds, the applicant attempted relitigate the issues which had been conclusively settled (see paras 96 and 105).

(6) (per **Siti Norma Yaakob FCJ**) Section 94(2) of the Courts of Judicature Act 1964 ('the CJA') and its proviso do not have the effect of curtailing the judicial independence of any individual judge when the Chief Justice determines who should prepare and deliver separate judgments in a criminal appeal or matter. Thus, the applicant could not rely on his objection to s 94(2) of the CJA and its proviso to support his claim to have his appeals reviewed before another panel of the court on the ground that the provision impinged on the independence of individual judge (see para 69).

(7) (per **Siti Norma Yaakob FCJ**) Although the concurrence of the other two members was not expressly stated in the judgment, it made no difference if such concurrence had been more than adequately revealed in the language of the judgment (see para 66).

(8) (per **Siti Norma Yaakob FCJ**) The two separate judgments delivered in the applicant's appeals were adequately and unanimously decided on the main issues of conviction and sentence. Read together, the judgments represented the judgment of the court. The absence of a written judgment of the third member of the corum, did not affect the legality of the judgment and neither could it be taken to mean that he had dissented (see para 68).

[Bahasa Malaysia summary

Pemohon telah memfailkan empat usul. Usul pertama pada lampiran 80(a) adalah untuk satu perintah supaya mahkamah menggunakan kuasa-kuasa

A sedia adanya di bawah k 137 Kaedah-kaedah Mahkamah Persekutuan 1995 ('KMP') bagi mengenepikan sabitan dan hukuman pemohon yang telah disah dan dikekalkan oleh Mahkamah Persekutuan pada 10 Julai 2002. Usul kedua pada lampiran 89(a), pemohon telah memohon untuk satu perintah bahawa mahkamah menggunakan kuasa-kuasa sedia adanya di bawah k 137 KMP untuk membenarkan keterangan baru atau tambahan yang memberi kesan B kepada perbicaraan dikemukakan kerana keterangan tersebut tidak ada semasa perbicaraan.

Usul ketiga dan keempat pada lampiran-lampiran 97(a) dan 124(a), adalah untuk perintah bahawa pemohon diberikan kebenaran untuk bergantung kepada alasan-alasan tambahan semasa pembicaraan lampiran 80(a). Alasan-alasan C tambahan termasuklah pernyataan bahawa s 94(2) Akta Mahkamah Kehakiman 1964 ('AMK') bercanggah dengan perlembagaan dan tidak sah, dan tidak mempunyai kesan kerana ianya mencerobohi kebebasan kehakiman para hakim.

Pada permulaan prosiding, responden membangkitkan suatu bantahan D awal berhubung dengan usul pertama bahawa mahkamah tidak mempunyai bidang kuasa sama ada di bawah undang-undang atau common law untuk melitigasikan semula rayuan-rayuan tersebut.

Diputuskan, menolak permohonan-permohonan tersebut:

E (1) (oleh **Abdul Malek Ahmad PMR**) Mahkamah Persekutuan mempunyai bidang kuasa untuk mendengar permohonan di bawah k 137 KMP apabila ia berpendapat ianya adalah perlu untuk menghalang ketidakadilan atau bagi menghalang penyalahgunaan proses mahkamah (lihat perenggan 44).

F (2) (oleh **Abdul Malek Ahmad PMR**) Di bawah k 137 KMP, Mahkamah Persekutuan mempunyai bidang kuasa dan kuasa untuk membuka kembali dan mengkaji semula sebarang perkara yang telah diputuskan oleh mahkamah jika terdapat dakwaan ketidakadilan atau penyalahgunaan proses mahkamah. Fasal 2(c) per 121 PP memperuntukkan 'apa-apa bidang kuasa lain yang diberikan oleh atau di bawah undang-undang G persekutuan.' Maka dengan itu, maksud 'undang-undang persekutuan' para (b) pada fasal 2 per 160 PP hanya terpakai kepada mana-mana Akta Parlimen. Ini termasuk KMP, yang merupakan undang-undang subsidiari Akta Parlimen berkenaan, iaitu Akta Mahkamah Kehakiman. Di bawah ss 16 dan 17 AMK, peraturan boleh dibuat untuk amalan dan prosedur di mana mahkamah mempunyai bidang kuasa (lihat H perenggan 45 dan 46).

(3) (oleh **Alauddin HMP**) Pada fakta, keterangan baru yang dikatakan oleh pemohon dalam perenggan 17 lampiran 89(a) bukanlah satu keterangan yang tidak ada semasa perbicaraan. Ianya ada semasa perbicaraan dan hakim bicara telah memutuskan bahawa keterangan I tersebut tidak relevan. Oleh kerana keterangan tersebut tidak relevan kepada pertuduhan yang dihadapi oleh pemohon, ianya tidak memberi kesan yang material kepada keputusan kes. Oleh yang demikian,

keterangan tersebut bukanlah satu keterangan yang baru atau tambahan (lihat perenggan 82 dan 83).

(4) (oleh **Alauddin HMP**) Tiada keadaan yang mengecualikan, tiada penipuan atau menyekat keterangan dan tiada keterangan baru dihadapan mahkamah yang memeritkan mahkamah untuk membuka semula atau mendengar semula kes tersebut (lihat perenggan 88).

(5) (oleh **Alauddin HMP**) Prosiding penghinaan mahkamah adalah satu prosiding yang berasingan. Tidak terdapat sebarang kaitan di antara pertuduhan rekaan/pemalsuan dan rayuan rasuah. Keputusan dan pemerhatian Mahkamah Persekutuan berhubung dengan prosiding penghinaan mahkamah tidak mempunyai sebarang kesan langsung ke atas pertuduhan rasuah. Dengan memperkenalkan alasan-alasan baru, ianya satu percubaan oleh pemohon untuk cuba melitigasikan semula isu-isu yang telah diputuskan (lihat perenggan 96 dan 105).

(6) (oleh **Siti Norma Yaakob HMP**) Seksyen 94(2) Akta Mahkamah Kehakiman 1964 ('AMK') dan peruntukan-peruntukannya tidak memberi kesan menghalang kebebasan kehakiman seseorang hakim apabila Hakim Besar memutuskan siapa harus menyediakan dan memberi penghakiman yang berasingan di dalam satu rayuan atau perkara jenayah. Dari itu, pemohon tidak dapat bergantung pada bantahan yang s94(2) AMK dan pertuntukan-peruntukannya menyokong permohonannya untuk kajian semula rayuannya di hadapan panel hakim yang lain atas alasan peruntukan tersebut menceroboh kebebasan kehakiman seseorang hakim (lihat perenggan 69).

(7) (oleh **Siti Norma Yaakob HMP**) Walaupun persetujuan dua hakim yang lain tidak dinyatakan dengan nyata di dalam penghakiman, ianya tidak memberi sebarang perbezaan kerana persetujuan para hakim tersurat dengan jelas dari bahasa yang digunakan didalam penghakiman tersebut (lihat perenggan 66).

(8) (oleh **Siti Norma Yaakob HMP**) Dua penghakiman berasingan yang diberikan pada masa rayuan pemohon adalah mencukupi dan secara sebulat suara memutuskan isu utama berhubung dengan sabitan dan hukuman. Dibaca bersama, penghakiman-penghakiman tersebut mewakili penghakiman mahkamah. Ketiadaan penghakiman bertulis dari ahli ketiga korum, tidak memberi kesan kepada kesahihan penghakiman dan tidak juga bermakna beliau tidak bersetuju (lihat perenggan 68).]

Notes

For cases on double judgment, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1886–1888.

For cases on evidence in appeal, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 255–294.

For cases on the jurisdiction of the Federal Court, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1677–1678.

For cases on the power and duty of the appellate court, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 160–214.

Cases referred to

Adorna Properties Sdn Bhd v Kobchai Sosothikul (Federal Court Civil Appeal No 02-14-1997(P)) (refd)
Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application [2001] 2 MLJ 305 (refd)
Asiatic Development Bhd & Anor v Balachandar a/l Palanysamy [1995] 3 MLJ 445 (refd)
Attorney-General v Sillem (1864) 11 ER 1200 (refd)
Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549 (distd)
British South Africa Co v Compania de Mocambique (1893) AC 602 (refd)
Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1 (refd)
Dato' Mohamed Hashim Shamsuddin v Attorney-General, HongKong [1986] 2 MLJ 112 (refd)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193 (refd)
Juraimi bin Husin v PP; Mohd Affandi bin Abdul Rahman & Anor v PP [1998] 1 MLJ 537 (refd)
Keshodass Wadhumal Advani v Syed Murtaza Ali Khan AIR 1952 All 318 (refd)
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70 (refd)
Lo Fat Thjan & Ors v PP [1968] 1 MLJ 274 (refd)
Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors [1986] 1 MLJ 166 (refd)
Megat Najmuddin bin Dato' Seri Dr Megat Khas v Bank Bumiputra (M) Sdn Bhd [2002] 1 MLJ 385 (refd)
MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673 (refd)
Mohamed bin Jamal v PP [1964] MLJ 254 (refd)
Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 (refd)
R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2) [1999] 1 All ER 577 (refd)
R v Parks [1961] 3 All ER 633 (refd)
Re Zainur Zakaria [1999] 2 MLJ 577 (refd)
Seray-Wurie v Hackney London Borough Council [2002] 3 All ER 448 (refd)
Tai Chai Yu v The Chief Registrar of the Federal Court [1998] 2 MLJ 474 (refd)
Taylor & Anor v Lawrence & Anor [2002] 1 All ER 353 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259 (refd)
Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd (Federal Court Civil Appeal No 02-5-2003(W) (refd)
Zainur Zakaria v PP [2001] 3 MLJ 604 (refd)

Legislation referred to

Constitution of India art 137
Courts of Judicature Act 1964 ss 16(1), 17, 68(1)(a), 74(2), 78(1), 92(1), 94(2)
Courts of Judicature Act No 7 of 1964
Courts Ordinance 1948 s 31(2)
Emergency (Essential Powers) Ordinance 1970 ss 2(1)
Evidence Act 1950 s 167
Federal Constitution arts 121, (2)(c), 124(2), 128, 130, 160(2)(b)
Interpretation and General Clauses Ordinance 1948
Judges' Code of Conduct 1994 r 3(1)(d)
Rules of the Federal Court 1995 rr 63, 137
Supreme Court Rules 1966 [India] O 40

Appeal from: Criminal Appeal No W–05–25 of 1999 & W–05–27 of 1999 (Court of Appeal, Malaysia)

Karpal Singh (SN Nair, Gobind Singh Deo, Kamar Ainiah Kamaruzaman, Pawancheek Marican, Zulkifli Noordin, Saiful Izham Ramli, Christopher Fernando and Marisa Regina with him) (Karpal Singh & Co) for the appellant.

Abdul Gani Patail AG (Mohd Yusof Hj Zainal Abiden, Abdul Majid Tun Hamzah and Ahmad Fairuz Zainol Abidin with him) (AG's Chambers) for the respondent.

Vernon Ong (Bar Council) watching brief.

Cur Adv Vult

Abdul Malek Ahmad PCA:

[1] Heightened by the release of the applicant by this court on sodomy charges some four days before we heard these applications, the intense speculation pertaining to the outcome of the four motions before us had certainly generated a certain amount of undue interest and unwanted publicity. This bad timing certainly would not have occurred if the first of the four motions filed on 9 August 2002, applying to set aside the convictions and sentences of the applicant on corruption charges, had been disposed of much earlier considering the lapse of 25 months.

[2] The first motion at encl 80(a) filed on 9 August 2002 was for an order that the court invokes its inherent powers under r 137 of the Rules of the Federal Court 1995 ('the RFC') to set aside the convictions and sentences of the applicant that were confirmed and upheld by this court on 10 July 2002 or make such further or other orders it deemed fit and proper in the interests of justice.

[3] The second motion at enclosure 89(a) filed on 10 March 2003 was for an order that this court again invoke its inherent powers under r 137 of the RFC to allow fresh/additional evidence affecting the trial to be adduced as such evidence was not available during the trial or make such further or other orders it deemed fit and proper in the interests of justice.

[4] The third motion at encl 97(a) filed on 14 March 2003 was for an order that the applicant be allowed leave to rely on five additional grounds stated therein.

[5] The fourth motion at encl 124(a), filed four days before the hearing, was also for an order that the applicant be allowed leave to rely on another additional ground which was that s 94(2), including the proviso thereto, of the Courts of Judicature Act 1964 ('the CJA') is unconstitutional and void and of no effect as it impinges on the judicial independence of the individual judges of the Federal Court.

[6] I shall only deal with the jurisdiction point while the four motions will be dealt with in detail by my learned sister Siti Norma Yaakob FCJ and my learned brother Alauddin FCJ in their separate judgments.

[7] It is pertinent at this point to reproduce r 137 of the RFC which reads:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[8] At the commencement of the proceedings, the learned Attorney-General for the respondent and Karpal Singh for the applicant told the Court that both parties had agreed that arguments would begin with the preliminary objection by the respondent on the first motion. On hindsight and having heard their submissions, it was our finding that the preliminary objection was quite unnecessary as it could have easily been argued as part of the submissions on the motions themselves.

[9] The learned Attorney-General started off by stating that r 137 of the RFC is *ultra vires* the CJA and the Federal Constitution ('the FC'). He added that this is not the first criminal review as on 10 June 2003 this court (Haidar CJ (Malaya), Steve Shim CJ (Sabah and Sarawak) and Siti Norma Yaakob FCJ) had in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 in Federal Court Criminal Appeal No 05-6-1997(P) dismissed a similar application.

[10] Karpal Singh for the applicant had immediately interjected to say that there was no written judgment in that application and that this court did not in any way state that r 137 of the RFC did not apply. The relevant order, he said, only stated that the application was dismissed. Further, the relevant newspaper report only mentioned that the court had to dismiss the application based on the fact that there has been a final decision relating to the conviction and sentence.

[11] The learned Attorney-General continued by saying that r 137 of the RFC was created pursuant to s 17 of the CJA which must be read together with s 16 thereof. Section 16 of the CJA, he said, provided for the making of rules of court only for the purpose of prescribing the practice and procedure where the court has jurisdiction.

[12] He added that there is a distinction between 'jurisdiction' and 'power'. The former, he continued, denotes the types of subject matter which the court may deal with and in relation to which it may exercise its powers. He said that the court cannot exercise powers in matters over which it has no jurisdiction. He stressed that the court must have jurisdiction before it can exercise its powers.

[13] He then referred to cl (2) of art 121 of the FC which reads:

> (2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say —
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> (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;
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> (b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and
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> (c) such other jurisdiction as may be conferred by or under federal law.".

[14] Article 121 of the FC, he argued, relates to the judicial power of the Federation. The learned Attorney-General also cited two articles in the Federal Constitution which deal with the jurisdiction of this court and they are arts128 and 130 of the FC.

[15] Reference was made to *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 where this court (Lamin PCA, Edgar Joseph Jr and Wan Adnan FCJJ), at the conclusion of arguments on the preliminary objection taken by learned counsel for the respondents, held that this court had no jurisdiction to entertain the appellant's application for leave to appeal.

[16] Unfortunately, we felt that this authority was off its mark as there the High Court gave judgment for less than RM250,000 and consequently the Court of Appeal refused to grant leave to appeal under s 68(1)(a) of the CJA. The finding of this court was more in the context of whether an appeal lies to this court from such a refusal of the Court of Appeal.

[17] The learned Attorney-General pointed out that in India, the powers to review a judgment is enacted in the Indian Constitution itself at art 137 which states:

> Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

[18] In consequence, he argued that there is a finality to appeals as there is a Pardons Board and we cannot allow matters to be reopened. He emphasised that r 137 of the RFC is not a jurisdiction provision as it is made pursuant to s 17 of the CJA.

[19] The Rules Committee, he added, cannot draft rules on this matter. The argument that ss 16 and 17 of the CJA make provision for the Rules Committee to make rules to confer jurisdiction to this court is contrary to the enshrined doctrine of separation of powers which expressly provide that legislative powers conferring jurisdiction to the courts are to be exercised by its elected legislature.

[20] Karpal Singh submitted that r 137 of the RFC is subsidiary legislation and must be construed as such in essence and in substance. He said that the learned Attorney-General may have a point in saying that being subsidiary legislation, it cannot confer jurisdiction and power but it was his contention that inherent powers are at all levels and it was unfortunate that in the *Tunde Apatira* application, the opportunity did not arise to address the matter at length.

[21] He argued that it is inherent jurisdiction which confers the power and not r 137 of the RFC which is superfluous. In criminal matters, he added, the courts should be more inclined to use its inherent jurisdiction.

[22] Learned counsel referred to *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1 where this court (Mohd Dzaiddin CJ, Steve Shim CJ (Sabah and Sarawak) and Haidar FCJ) held that r 137 of the RFC clearly gives the Federal Court the inherent power to hear any application or to make

any order as may be necessary to prevent injustice although the issue of reopening or reviewing the court's decision in that case did not arise.

[23] The finding in that case as regards the issue of reopening or reviewing the court's decision not arising has to be viewed in the context of the circumstances of that application. The appeal in the Federal Court there was heard on 3 August 2000 before Eusoff Chin CJ, Wan Adnan Ismail CJ (Malaya) and Zakaria Yatim FCJ but judgment was reserved. On 19 December 2000, the parties' solicitors were informed that judgment would be pronounced on 22December 2000. This, the deputy registrar did, allowing the appeal with costs.

[24] The contention of the respondents there was that the judgment pronounced on 22 December 2000 was a nullity as two of the three judges on the panel had retired as judges before that date and relied on r 63 of the RFC dealing with pronouncement of judgment. Learned counsel for the appellants, on the other hand, relied on s 78(1) of the CJA pertaining to, as the marginal note states, 'continuation of proceedings notwithstanding absence of judge'.

[25] The relevant excerpt of the judgment states:

> In my opinion, there is a clear distinction between the giving of judgment under s 78 of the Act and the pronouncement of the said judgment in r 63 of the Rules. Section 78 of the Act provides that the judgment or reserved judgment shall be given by the remaining judges of the court, not being less than two, and in which case, the court shall be deemed to be duly constituted. This begs the question: when is the judgment of the remaining judges given? The section does not provide the manner in which the time from when the judgment is to take effect. Rule 63 of the Rules seems to provide the answer. Clearly, r 63 of the Rules provides the mode how a judgment is to be delivered, which is, by pronouncement in open court, and under para (2) of r 63 of the Rules, it may be read by a judge of the court or by the registrar. It seems that this was also the practice of the House of Lords where the pronouncement is made in open court in a formal way (*W'Field Fr Co v Steel Construction Co* at p 686). It must not be forgotten that the Rules have statutory force and are not mere rules of practice. See *Pacific Centre Sdn Bhd v United Engineers (M) Sdn Bhd* [1984] 2 MLJ 143.

[26] On the question of jurisdiction, which interestingly enough the submissions of learned counsel for the appellants there are similar to that of the learned Attorney-General here, this court said:

> Dato' Dr Das also submitted that the Federal Court has no jurisdiction to reopen or rehear a case or review its own decision. Counsel relied on art 128(3) of the Federal Constitution, which states 'the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.' The Courts of Judicature Act 1964 is such a law. He also referred to *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166, where Abdul Hamid CJ (Malaya), (as he then was) held as follows (at p 168):
>
> > 'Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to reopen, rehear and re-examine its

decision for whatever purpose. The only exception where there can be a rehearing is only to the extent provided by s 42, in particular sub-s (3) of s 42. The other exception is as provided under s 44 sub-s (3) to the effect that every order such as that envisaged in sub-s (1) of s 44 may be discharged or varied by the full court.'

Counsel further submitted that r 137 of the Rules does not confer jurisdiction or power on the Federal Court.

In reply, Mr Cecil Abraham submitted that in the instant case, the judgment was not given in accordance with the law, ie under s 78 of the Act and r 63 of the Rules. This court has the inherent power to determine the issue in order to prevent injustice to the respondents.

With respect, I disagree with Dato' Dr Das that this court has no jurisdiction to hear this application. Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice. The issue of reopening or reviewing our own decision in the instant case therefore does not arise.

Conclusion

For the above reasons, the application of the respondents for an order that the judgment dated 22 December 2000 be set aside, is allowed with costs, because on that date, the court was not duly constituted as there was only one remaining judge of the court. I also order that the application of the appellant (to) set aside the *exparte* order dated 4 January 2001, allowing the stay of execution be dismissed with costs. In the result, the appeal shall be reheard by a newly constituted panel of the Federal Court.

[27] Despite concluding that the issue of reopening or reviewing its own decision did not arise, it ordered that the appeal be reheard by a newly constituted panel of the Federal Court. It has, therefore, to be read with the fact that nothing was being reopened or reviewed as the first panel was not duly constituted but all the same, r 137 of the RFC had been applied to overcome the problem.

[28] Learned counsel next cited *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 (Steve Shim CJ (Sabah and Sarawak), Siti Norma Yaakob and Haidar FCJJ) where Steve Shim CJ (Sabah and Sarawak) dissented only on the point of consent under s 78 of the CJA. The original appeal in that case was heard by Eusoff Chin CJ, Wan Adnan CJ (Malaya) and Chong Siew Fai CJ (Sabah and Sarawak) on 12 and 13 January 1998. The senior assistant registrar read out the reserved judgment on 12 July 2002, ten days after Chong Siew Fai CJ (Sabah and Sarawak) had retired. Following *Chia Yan Teck*'s case, and because no consent had been obtained by the parties under s 78 of the CJA, the appeal was ordered to be reheard before another panel of this court.

[29] In that application, Steve Shim CJ (Sabah and Sarawak) said at pp684 and 685 of the report as follows:

Inherent jurisdiction

Let me say without more that whilst I agree with the applicant's counsel's contention that the Federal Court has inherent jurisdiction under the common law to review

its previous decision, I am however unable to accept his stand that *Lye Thai Sang* was decided *per incuriam*. I agree entirely with the view expressed by the Supreme Court in *Lye Thai Sang* that s 69(4) of the CJA could not be construed to confer an unlimited power on the Supreme Court to review an earlier decision in an appeal which had already been heard and disposed of and therefore, in that context, the Supreme Court had no power to reopen, rehear and re-examine its previous decision for whatever purpose. Quite clearly, that observation was made in the context of the proper construction to be placed on s 69(4) of the CJA. But that cannot be read to mean that the Supreme Court had been deprived of its inherent jurisdiction derived under the common law by virtue of s 3(1)(a) of the Civil Law Act 1956, read with art 121(2) of the Constitution. This is the common law exception quite apart from the statutory exceptions referred to in *Lye Thai Sang*. In any event, the Federal Court has now been conferred with inherent power under r 137 of the Rules of the Federal Court 1995. This had also been reiterated very recently by the Federal Court in the case of *Chia Yan Teck & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1 wherein Mohamed Dzaiddin CJ said at p 10:

> 'Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice.'

For the reasons stated, I hold the view that the Federal Court does have the inherent jurisdiction and power which can be invoked in limited circumstances to reopen, rehear and re-examine its previous judgment, decision or order which has been obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court. In the circumstances, the preliminary objection raised by counsel for the respondent fails.

[30] Just for the record, the learned judge had in fact expressed the same view three months earlier in *Megat Najmuddin bin Dato' Seri Dr Megat Khas v Bank Bumiputra (M) Sdn Bhd* [2002] 1 MLJ 385 sitting with Wan Adnan CJ (Malaya), Abdul Malek Ahmad, Ahmad Fairuz and Mohtar Abdullah FCJJ.

[31] Learned counsel also referred to the case of *Taylor & Anor v Lawrence & Anor* [2002] 1 All ER 353 where it was held by a five-member panel of the Court of Appeal in England that it had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was a tension between a court having such a residual jurisdiction and the need to have finality in litigation, so that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established, and that might justify the Court

of Appeal in taking the exceptional course of reopening proceedings which it had already heard and determined. It should, however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party was the author of his own misfortune would also be relevant considerations. Where the alternative remedy would be an appeal to the House of Lords, the Court of Appeal would only give permission to reopen an appeal which it had already determined if it were satisfied that the House of Lords would not give permission to appeal.

[32] Some four months later, in *Seray-Wurie v Hackney London Borough Council* [2002] 3 All ER 448, a three-member panel of the Court of Appeal in England held the same view adding that the court should exercise strong control over any such application, so as to protect those who were entitled reasonably to believe that the litigation was already at an end.

[33] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 involved the extradition sought by the government of Spain of the former head of state of Chile. Two provisional warrants for his arrest were issued by a metropolitan stipendiary magistrate. The applicant successfully applied to the Divisional Court to quash those warrants, but the quashing of the second warrant was stayed to enable an appeal to the House of Lords on the question of the proper interpretation and scope of the immunity of a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed whilst he was head of state. Amnesty International was granted leave to intervene in the proceedings. On 25 November 1998, the appeal was allowed by a majority of three to two and the second warrant was restored. Subsequently, the applicant discovered that one of the Law Lords in the majority was a director and chairperson of Amnesty International Charity Ltd, which had been incorporated to carry out Amnesty International's charitable purposes and petitioned the House to set aside the order of 25 November 1998.

[34] It was held by the House of Lords that the principle that a judge was automatically disqualified from hearing a matter in his own cause was not restricted to cases in which he had a pecuniary interest in the outcome, but also applied to cases where the judge's decision would lead to the promotion of a cause in which the judge was involved together with one of the parties. That did not mean that judges could not sit on cases concerning charities in whose work they were involved, and judges would normally be concerned to recuse themselves or disclose the position to the parties only where they had an active role as trustee or director of a charity which was closely allied to and acting with a party to the litigation. In the instant case, the facts were exceptional in that Amnesty International was a party to the appeal, it had been joined in order to argue for a particular result and the Law Lord was a director of a charity closely allied to Amnesty International and sharing its objects. Accordingly, he was automatically disqualified from hearing the appeal. On that score, the petition was granted and the matter was referred to another committee of the House for rehearing.

[35] We also need to mention the Court of Appeal case of *Tai Chai Yu v The Chief Registrar of the Federal Court* [1998] 2 MLJ 474 (Gopal Sri Ram, Siti Norma Yaakob and Ahmad Fairuz JJCA) where the respondent, the registrar, rejected the petition filed by the appellant, a solicitor, purportedly invoking the original or consultative or inherent jurisdiction of the Federal Court for the purpose of reviewing a decision of that court given earlier against the appellant's client. The appellant's application for leave to apply for an order of *certiorari* against the registrar was refused by the judge on the ground that the application was frivolous. The appellant appealed. It was held, in dismissing the appeal, that it is trite law that the Federal Court has no jurisdiction of any sort to reopen and review its decision in a case, neither the FC nor the CJA confer any such jurisdiction upon the Federal Court and that a final decision of the Federal Court, once pronounced, is binding upon the parties thereto and its correctness may only be questioned in a subsequent case where the identical point of law arises for decision. Furthermore, the court took into consideration that the appellant was not the person aggrieved by the decision of the registrar. It was his client's petition that the registrar rejected. The appellant was a stranger to the complaint and, therefore, lacked standing to challenge the decision in question. This is the only case which we have found to follow *Lye Thai Sang*'s case but apart from it being only at the Court of Appeal level, by which we are not bound, we should add that the court had taken note that the appellant there was not the person aggrieved by the decision of the respondent. As for *Lye Thai Sang*, it must be emphasised here that the only provision considered there was s 69 of the CJA while r 137 of the RFC was never considered.

[36] Since then, there has been a number of other applications dealt with by this court under r 137 of the RFC including *Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application* [2001] 2 MLJ 305 (Federal Court Civil Appeal No 08–32–1996(W)), *Adorna Properties Sdn Bhd v Kobchai Sosothikul* (Federal Court Civil Appeal No 02–14–1997(P)) and *Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd* (Federal Court Civil Appeal No 02–5–2003(W)).

[37] We now revert to r 137 of the RFC. Since it is made under section 17 of the CJA, it is certainly subsidiary legislation. We have cited the passage in *Chia Yan Teck* where this court, in relying on r 63 of the RFC, had said that the RFC have statutory force and are not mere rules of practice relying on *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143.

[38] Similarly, in *Dato' Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong* [1986] 2 MLJ 112 (Salleh Abas LP, Seah and Abdoolcader SCJJ), the majority view was that the statutory source and enabling provision for O66 of the Rules of the High Court 1980 is s 16(1) of the CJA. The Supreme Court also held that Order 66 of the said Rules is valid and properly enacted in relation to both civil and criminal proceedings and therefore the order made in that case is intra vires. Reading the written submissions of the learned Attorney-General on the preliminary objection, we note that a substantive portion therein is based on the dissenting judgment of Seah SCJ in that case with which we are not inclined to agree.

[39] It is of no consequence to us that in India, the relevant power to review is a constitutional provision read with O 40 of the Supreme Court Rules 1966. The principle remains the same. As stated in the AIR*Commentaries to the Constitution of India* Volume III 2nd (1971) Edition at p 226:

> The Federal Court would exercise its power of review for the purpose of rectifying a mistake which had crept in by misprision in embodying the judgments, or had been introduced through inadvertence in the details of judgments. It could also supply manifest defects in order to enable the decrees to be enforced or add explanatory matter or reconcile inconsistencies. The indulgence by way of review was granted mainly owing to the natural desire to prevent irremediable injustice being done by a Court of last resort as where, by some accident, without any blame, a party had not been heard and an order had been inadvertently made as if the party had been heard. But in no case could a rehearing be allowed upon the merits or even on the ground that new matter had been discovered which if it had been produced at the hearing of the appeal might materially have affected the judgment of the Court.

[40] The learned Attorney-General agrees that r 137 is subsidiary legislation which has been defined in the Interpretation and General Clauses Ordinance 1948, which is the law to be applied for the interpretation of the FC, as any Order in Council, proclamation, rule, regulation, order, notification, by-law or other instrument made under any Ordinance, Enactment or other lawful authority and having legislative effect.

[41] He submitted that subsidiary legislation must not be inconsistent with, or contrary to, the provisions of the parent Act. Nowhere does the CJA make provision for conferring jurisdiction or power to review, rehear or reopen an appeal which has been disposed of. And this follows that the rules made under the parent Act cannot confer such jurisdiction or power. Section 16 of the CJA provides that the rules made would be confined only to matters of procedure and practice. Therefore, r 137 of the RFC which was made pursuant to s 17 read together with s 16 of the CJA must be read with the other provisions of the RFC and should be construed within the parameters set out under s 16 of the CJA. To construe it as conferring or creating additional jurisdiction would be *ultra vires* the CJA itself and also the FC. The RFC, he added, must also not be in conflict with the intention of the legislature in enacting the substantive legislation namely ss 16 and 17 of the CJA.

[42] He went on to say that the RFC, made pursuant to s 17 of the CJA, only prescribes the practice and procedure to be followed but not granting jurisdiction to the Federal Court citing *Attorney-General v Sillem* (1864) 11 ER 1200, *British South Africa Co v Compania de Mocambique* (1893) AC 602 and *Keshodass Wadhumal Advani v Syed Murtaza Ali Khan* AIR 1952 All 318 on point and concluding that r 137 of the RFC is *ultra vires* the Federal Constitution.

[43] We certainly do not agree with the learned Attorney-General on this as s 16 of the CJA begins with 'Rules of court may be made for the following purposes'. And the relevant para (a) states:

A (a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court, [the Court of Appeal and the Federal Court] in all causes and matters whatsoever in or with respect to which those Courts have for the first time being jurisdiction (including the procedure and practice to be followed in the registries of those Courts), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to a High Court [to the Court of Appeal or to the Federal Court] shall be made.

[44] It cannot be said that we do not have the jurisdiction, as this has been repeatedly decided in a number of authorities before this, to hear an application brought before us under r 137 of the RFC where it is found necessary to prevent injustice or to prevent an abuse of the process of the court.

[45] We also take note that cl 2(c) of art 121 of the FC provides 'such other jurisdiction as may be conferred by or under Federal law'. Consequently para (b) of the definition of 'Federal law' at cl (2) of art 160 of the FC only applies to any Act of Parliament. The learned Attorney-General says this does not include the RFC but we beg to differ as the RFC is the subsidiary legislation of the relevant Act of Parliament namely the CJA. And looking at both ss 16 and 17 of the CJA, we hold that rules can be made for the practice and procedure where the courts have jurisdiction. The long line of cases certainly seem to support our thinking that we have the jurisdiction and the power to reopen and review any matter already decided by this court if there is any allegation of injustice or abuse of the process of the court.

[46] Having considered the arguments and the authorities, we were of the view, which is unanimous, that we have the jurisdiction to deal with all the four motions filed as it is our finding that r 137 of the RFC has legislative effect. Accordingly, on 7 September 2004, we had overruled the preliminary objection by the respondent and proceeded to hear all the four motions.

[47] My learned sister Siti Norma Yaakob FCJ and my learned brother Alauddin FCJ have seen this judgment in draft and have expressed their agreement with it. Similarly, as regards the four motions, I have had the advantage of reading their respective judgments and totally agree with the reasoning and conclusions therein.

Siti Norma Yaakob FCJ:

[48] Four separate notices of motion have been filed by the applicant for the common purpose of seeking to review an earlier judgment of this court dated 10 July 2002 ('the impugned judgment'). The impugned judgment upheld and confirmed the convictions and sentences that had been imposed on the applicant by the High Court after he was found guilty on four charges of corruption under s 2 of the Emergency (Essential Powers) Ordinance 1970. Appeals by the applicant against such convictions and sentences had also been dismissed by the Court of Appeal on 29 April 2002.

[49] The four notices of motion seek:-

(1) to set aside the convictions and sentences as seen from encl 80(a) which is dated 9 August 2002. The applicant relies on twelve grounds but

before us, his counsel, Mr Karpal Singh confined his submissions to only four grounds namely those stated at paras 5(3), (4), (5) and (12) of the applicant's affidavit in support of encl 80(a).

(2) to allow fresh/additional evidence that was not available during the trial to be adduced as seen from encl 89(a) which is dated 10 March 2003.

(3) leave to rely on five additional grounds at the hearing of encl 80(a). This is encl 97(a) and is dated 14 March 2003 and the five additional grounds are stated as follows.

(i) the impugned judgment infringed the provisions of the proviso to s 94(2) of the Courts of Judicature Act 1964 ('the Act').

(ii) the three member bench of this court that heard the applicant's appeals ('the first corum') had not directed its mind to the fact that the Court of Appeal did not have the opportunity to consider the remarks expressed by another panel of this court ('the second corum') in the contempt proceedings against Zainur Zakaria, one of the applicant's counsel at his trial. These remarks relate to the conduct of the trial judge and the loss of opportunity by the Court of Appeal to consider those remarks deprived that court from making a ruling as to the suitability of the trial judge to continue the trial to its conclusion.

(iii) the failure of the first corum to direct its mind to the same remarks had prevented the first corum from ruling that such conduct infringed the provisions of r 3(1)(d) of the Judges' Code of Conduct 1994.

(iv) the failure of the first corum to link the same remarks to the

(v) applicant's trial deprived it from concluding the trial judge's bias against the applicant.

(vi) that the trial judge's bias was so serious that the proviso to s 92 of the Act could not be invoked.

(4) leave to rely on another additional ground at the hearing of encl 80(a). That additional ground is in fact an extension of the ground in para 5(12) of encl 80(a) and in substance it posed the question as to whether s 94(2) including the proviso thereto of the Act is unconstitutional and void and is of no effect as it impinges on the judicial independence of individual judges of the Federal Court. This notice, encl 124(a), is dated 2 September 2004.

[50] As the effect of the applications in encls 80(a) and 89(a) is to reopen, rehear and review appeals that have already been heard and disposed of on their merits, a preliminary objection was taken by the respondent that we do not have the necessary jurisdiction either in law or under common law to relitigate on such appeals. The respondent further contends that r 137 of the Federal Court Rules 1995 on which the two applications are grounded has no application.

[51] My brother, Abdul Malek Ahmad PCA has already dealt with this preliminary objection and for the reasons that he has stated in his judgment,

I concur that the preliminary objection is misplaced as r 137 does provide us with the inherent powers to review our earlier decisions provided that such an exercise can only be undertaken sparingly and only in rare and exceptional circumstances to prevent injustice.

[52] Following our ruling that r 137 is not *ultra vires* the Act or the Federal Constitution and that we can invoke our inherent powers under that rule, no objection was taken by the respondent for the applications for leave in encls 97(a) and 124(a) and we accordingly granted leave to the applicant to rely on the additional grounds in his applications to review.

[53] As there was overlapping in the nature of the grounds relied upon to support the applications to review, those grounds became clearer after the submissions of both Mr Karpal Singh and Mr Christopher Fernando, the applicant's lead counsel, as both of them confirmed that they were raising the following issues to support their applications to review:

(1) whether the impugned judgment has any legal effect as it was delivered pursuant to a provision of the law which impinges on the independence of individual judges.

(2) whether the remarks on the conduct of the trial judge made in the contempt proceedings against Zainur Zakaria

(i) had the effect of depriving the Applicant of one tier of appeal.

(ii) had the effect of supporting a ruling that the trial judge had infringed the provisions of r 3(1)(d) of the Judges' Code of Conduct 1994 .

(iii) should have been considered by the first corum as forming a link (and not considered in isolation as was done) to establish the trial judge's bias against the applicant.

(3) whether the first corum had correctly invoked the proviso to s 92(1) of the Act bearing in mind that the trial was flawed as the trial judge was biased. I need to mention here that in encl 97(a) reference is made to the proviso to s 92 of the Act as the relevant law applicable. This cannot be right as the relevant proviso must be the proviso to s 92(1) of the Act as firstly sub-section (1) of the section is the only sub-section that has a proviso to it and secondly what is meant to be conveyed is that despite the bias shown by the trial judge, the first corum still maintained that such bias did not amount to there being a miscarriage of justice and relying on the proviso dismissed the applicant's appeals. This the applicant says amounts to a wrongful approach to s 92(1) of the Act.

(4) whether there had been a suppression of evidence when the trial judge refused to admit evidence showing the unprofessional conduct of two named prosecutors in attempting to procure fabricated evidence tending to show the applicant's improper sexual conduct.

[54] Since the right to review depends on the compelling circumstances of each case, I shall in this judgment attempt to consider one aspect of MrKarpal Singh's arguments namely all the issues relating to the applicability of s 94 (2) of the Act and the constitutionality of the proviso thereto.

[55] Section 94 is concerned with the manner to which judgments of this court are to be pronounced and delivered and for convenience I reproduce the provisions of the whole section as follows.

> 94 Judgment
>
> (1) On the termination of the hearing of an appeal the Federal Court shall, either at once or on some future day which shall either then be appointed for the purpose of which notice shall subsequently be given to the parties, deliver judgment in open court.
>
> (2) In criminal appeals and matters the Federal Court shall ordinarily give only one judgment, which may be pronounced by the Chief Justice or by such other member of the Federal Court as the Chief Justice may direct:
>
> Provided that separate judgments shall be delivered if the Chief Justice so determines.
>
> (3) The judgment of any member of the Federal Court who is absent may be read by any other Judge.

[56] Our focus however is on sub-section (2) and its proviso, the origin of which can be traced to similar provisions appearing in s 31(2) of the Courts Ordinance 1948 which has since been repealed and s 62(2) of the superseded Courts of Judicature Act No 7 of 1964.

[57] In interpreting sub-section (2)of s 94, Mr Karpal Singh drew our attention to the format in which judgments in criminal appeals of this court are to be prepared and delivered. He took exception to the fact that the impugned judgment is embodied in two separate written judgments delivered by two members of the first corum whilst the third member did not write any judgment at all. On its own, each of the two separate judgments dealt with separate subject matters, one on conviction and the other on sentence, and according to Mr Karpal Singh neither of the judgment is complete. Hecontends that each judgment should have dealt with conviction and sentence jointly rather than have the subject matters of the appeals split up as was done in the applicant's appeals. This is particularly so as the notices of appeal relate to both convictions and sentences.

[58] Since there are two separate judgments, then by implication the Chief Justice must have so directed, exercising his powers to do so under the proviso to s 94(2). Mr Karpal Singh then questioned the constitutionality of this proviso as it impinges on the judicial independence of individual judges.

[59] From the precise and unambiguous language of s 94(2), we agree that the usual and accepted practice is that there will be one judgment be it written or oral, delivered at the conclusion of the hearing of a criminal appeal or matter and this can only happen where all members of the corum have reached consensus and are unanimous in their decisions. The unanimous decision will then be delivered by the Chief Justice as a judgment of the court and again this can only happen when he presides as a member of the corum. If he does not so preside, then he directs a member of the corum to do so and by tradition that burden falls on the most senior member of the corum to deliver the unanimous judgment. This arrangement if I am permitted to state so is in compliance with s 74(2) of the Act which provides that in 'the absence of the Chief Justice, the most senior member of the court shall preside.'

[60] As an extension of the arguments of the learned Attorney-General, who appeared for the respondent, it is my considered opinion that s 94(2) does not prevent or debar separate written judgments being given by the other members of the corum even though the consensus reached had been a unanimous one. This is so as the reasons relied on to arrive at the unanimous conclusion need not necessarily be the same for each member of the corum and it is only through the separate judgments that the differing reasonings can be expressed.

[61] So far I have only alluded to the practice of pronouncing a unanimous judgment under the provisions of s 94(2). What happens when there is dissent when no unanimous majority can be reached in the outcome of an appeal. That situation manifests itself particularly in appeals where complexities of the law need to be determined thereby invoking differing views and conclusions. Under these circumstances reliance will be had to the proviso to s 94(2) as separate judgments need to be prepared and delivered and the Chief Justice determines who should write the separate judgments. Here there is in MrKarpal Singh's contention interference on the part of the senior most judge in the country to influence the outcome of the appeal, thereby impinging on the judicial independence of individual judges. He further contends that in so determining, the Chief Justice had run foul of the oath of office taken by judges upon appointment pursuant to art 124(2) of the FC.

[62] The element of interference should not arise where the Chief Justice presides over a criminal appeal where unanimity could not be reached. Byvirtue of his office and seniority he presides over all criminal appeals that are fixed before him and as such there is nothing objectionable to him directing who should prepare and deliver the separate judgments over the criminal appeals he presides. However can the same consideration apply when he directs who should prepare the separate judgments in a criminal appeal where he does not preside? The applicant maintains that he has no business to direct who should prepare the separate judgments as such direction amounts to interfering with the independence of individual judges. In this context when one speaks on the independence of the individual judge it must mean independence to decide a case without fear or favour, without reference from any quarter including any interference from the Head of the Judiciary.

[63] Perhaps the situation can be logically analysed by looking at the role of the Chief Justice when he decides to act under the proviso. He is not, as Mr Karpal Singh wants us to believe, dictating how a judge should decide a case, he is not asking the judge to decide favourably for a given person or authority. He is exercising a function which the law allows him to do i.e. to direct who should prepare and deliver separate judgments; no more no less. I regard such function as the performance of a non judicial duty affecting the administration of justice. It may well be that the complexity of the case warrants the production of more than one judgment and when he determines that should be the case, this determination in my considered opinion should not be regarded as being the basis of an interference which go to the very root of a judge's function as one who is fair and independent.

[64] Finally I come to the two separate judgments delivered in the applicant's appeals and the first question that brings to mind is whether they are concurrent judgments expressing the unanimous decision of the first corum. **A**

[65] To answer this question, the two judgments have to be read in their entirety and the concurrence and unanimity of the decisions made are to be gauged from the language used. **B**

[66] The judgment of Haidar FCJ, the most junior member of the first corum runs into 59 pages and dealt with the main issue on conviction. It is headed 'JUDGMENT OF THE COURT', and throughout the judgment, there is a strong preference in the use of the subjective plural 'we' as opposed to the subjective singular 'I' together with the corresponding possessive pronoun 'our' as opposed to 'my'. Thus phrases like "we need not consider, we do not propose, we would in answer say, it is not, in our respectful view, we agree", are some of such phrases used throughout the judgment and coupled with the heading of the judgment, it is my considered opinion that it is a concurrent judgment concluded after all the three members had discussed the issues raised and unanimously concluded that the convictions stand. The fact that the concurrence of the other two members is not expressed in the judgment makes no difference to my finding as such concurrence has been more than adequately revealed in the language of the judgment. **C** **D**

[67] Mohd Dzaiddin Abdullah, the then Chief Justice who presided in the appeals delivered the second judgment on sentence and although he had headed his judgment in his name his concluding remarks bear all the resemblance of a concurrent judgment. This is how he ended the judgment. **E**

> We are in full agreement with the statement of principle enunciated above.
>
> After considering the reasons given by the learned judge, we are satisfied that the imposition of the sentence of 6 years' imprisonment to commence from the date of conviction has not occasioned an error or principle of law. Therefore, we see no reason to interfere with the exercise of discretion vested in him. **F**
>
> Accordingly, we dismiss the appeal against sentence.

[68] Since both judgments have adequately and unanimously decided on the main issues of conviction and sentence, and read together they represent the judgment of the court, the absence of a written judgment from the Chief Judge of Sabah and Sarawak, the third member in the first corum cannot affect the legality of the judgment and neither can it be taken to mean that he has dissented. The fact that he had not produced a written judgment points to the conclusion that since he was in complete agreement to the views of the two members, no purpose would be achieved by a third judgment as he would be merely repeating what has already been adequately expressed in the judgments of Haidar FCJ and Mohd Dzaiddin CJ. **G** **H**

[69] My brothers, Abdul Malek Ahmad PCA and Alauddin FCJ who have had sight of this judgment agree that for the reasons stated in this judgment, it is our considered opinion that s 94(2) and its proviso do not have the effect of curtailing the judicial independence of any individual judge when the Chief Justice determines who should prepare and deliver separate judgments **I**

in a criminal appeal or matter. To that extent, the applicant cannot rely on his objection to s 94(2) and its proviso to support his claim to have his appeals reviewed before another panel of this court. My learned brother, Alauddin FCJ will now consider the remaining grounds in the applications to review.

Alauddin FCJ:

[70] By encl 89(a) the applicant prays for an order that this honourable court invoke its inherent powers under r 137 of the Rules of the Federal Court 1995, to allow fresh/additional evidence affecting the trial to be adduced as such evidence was not available during the trial. This application is supported by the affidavit of the applicant himself sworn on 10 March 2003 which is in encl 89(b).

[71] Briefly, the applicant's affidavit reveals the following facts:

(1) The applicant was charged under s 2 of the Emergency (Essential Powers) Ordinance No 22 of 1970 at the High Court of Malaya at Wilayah Persekutuan on 14 April 1999 on four charges of corruption. The applicant was found guilty of the said charges, convicted and sentenced to six years imprisonment on each charge, with the sentences being ordered to run concurrently.

(2) The applicant appealed against the decision of the High Court to the Court of Appeal which dismissed the appeal on 29 April 2002. He then appealed to the Federal Court against the decision of the Court of Appeal. On 10 July 2002 his appeal to the Federal Court was dismissed with the convictions and the sentences being confirmed.

[72] It has been brought to the applicant's knowledge that one of his counsel, Encik Zainur Zakaria (ZZ), had faxed copies of two letters he received from Mr Manjeet Singh Dhillon (MSD) to Mr Christopher Fernando, his lead counsel, just before the hearing of his appeal in the Court of Appeal. The letter sent to ZZ contained an enclosure which is a letter written by MSD to YAA the Chief Justice where MSD made a formal complaint against Augustine Paul J, the trial judge, for improper conduct in the *Re Zainur Zakaria* case which occurred during the applicant's trial.

[73] In the light of this new evidence contained in MSD's letter, the applicant instructed his counsel to file this application to urge this court to allow him to adduce such evidence in the interest of justice under r 137 of the Rules of the Federal Court 1995.

[74] As stated in para 17 of the applicant's affidavit, the evidence that is sought to be adduced is to the following effect:

(i) That MSD was requested by Tan Sri Mohtar (TSM) to see him before the proposed contempt proceedings against himself and ZZ began that morning. The request was made through MSD's counsel, Mr Jagjeet Singh (JS). MSD reluctantly agreed and met with TSM. They met at the ante room at the courthouse in the presence of Dato' Abdul Gani Patail (AGP), Datuk Azhar Mohamad (AM) and JS. Upon seeing MSD, TSM

went up and hugged him and turned around and told AGP and AM that MSD was an altruist and apologized to MSD for not having done anything on MSD's letter in which he had levelled accusations against AGP. TSM added that he had not as yet taken this matter up with his officers. MSD responded by reminding TSM that he had made very serious allegations against his officers and had written to him expecting something to be done but that nothing had been done. This letter referred to is the letter where MSD complained to TSM that AGP and AM had attempted to extort fabricated evidence from his client Datuk Nallakaruppan (DN) through him to be used against Datuk Seri Anwar Ibrahim (DSAI) in exchange for DN's life. TSM did not deny or refute MSD's allegations against his officers and both AGP and AM remained silent.

(ii) That as early as September 1998 DN had made a signed statement denying any involvement in any sexual improprieties involving the applicant. This statement was in response to the affidavits of SAC Musa Hassan dated 2 September 1998 making allegations against the applicant and DN and the affidavit of TSM making vague hearsay allegations. This evidence is clearly pertinent and relevant to the applicant's case. In summarily dismissing the applicant's application to stop AGP and AM from further conducting the prosecution against him the learned judge had this to say, (the relevant portion of which reads), 'Secondly the conclusion of MSD as contained in para 4 of the letter may be justifiable only if he arrived at after he had discussed the matter with his client in order to ascertain what his client knew. The letter is dated 12 October 1998. However, para 8 of the statutory declaration stated that MSD met his client on the 13 October 1998 to convey AGP's demands to him. This shows that MSD came to his conclusion even before he discussed the matter with his client to find out what the latter knew. I found support of this in para 8 of the statutory declaration where MSD had said that there was nothing his client could have done… short of lying. This clearly shows that up to 13 October 1998, MSD did not know what his client knew… .

[75] If we may be permitted to say, the gist of the new evidence sought to be adduced is as follows:

(i) It is MSD's revelation that he had a meeting with the former AG (TSM) in the ante room of the Federal Court in which TSM called him an altruist but did not take any further action in respect of his complaint against AGP and AM.

(ii) MSD says that Augustine Paul J, the trial judge, was wrong in concluding that he did not know whether his client knew about DSAI's involvement with women when he wrote the letter to TSM complaining about AGP and AM.

[76] In his lengthy submission in support of this application before us learned counsel for the applicant, Mr Christopher Fernando, began by saying that in this case there has been gross injustice perpetrated against the applicant. Fundamental principles of law have been violated and abused. There has

also been an abuse of the process of the court. It is most unprecedented in that the trial was allowed to be prosecuted by two unfair prosecutors in the persons of AGP and AM. Their conduct and participation had contaminated the entire proceedings. It was therefore urged upon us to use the inherent powers of this court to intervene and prevent injustice.

[77] It was submitted by learned counsel that the fresh/additional evidence sought to be adduced in this case through MSD was not available to the applicant during his trial. This evidence is relevant to the applicant's case. Further such evidence is credible and believable coming from a witness who is a senior and respected advocate and solicitor and a former Chairman of the Bar Council. In addition this evidence would have had a decidedly important influence on the outcome of the applicant's case.

[78] It was further submitted by learned counsel that in this case the applicant have met all the conditions to justify the reception of the evidence proposed to be adduced.

[79] In considering whether to allow fresh evidence to be adduced on appeal the English Court of Criminal Appeal in *R v Parks* [1961] 3 All ER 633 referred to certain principles. They are:

(1) the evidence sought to be called must be evidence which was not available at the trial;

(2) the evidence must be relevant to the issues;

(3) it must be credible evidence in the sense of being well capable of belief; and

(4) the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

[80] In *The Constitution of India AIR Commentaries* Vol III 2nd (1971) Edition, the writer, under the heading of 'Grounds of Review' had this to say (at p 228):

> Where a litigant has obtained a judgment in a Court of Justice, he is, by law entitled not to be deprived of that judgment without solid grounds. Where, therefore, a review of a judgment is asked for by a party, the greatest care ought to be exercised by the court in granting the review especially where the ground of review is the discovery of fresh evidence. It is so easy to the party who has lost his case to see what the weak part of his case was, and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong (1). The rule that permits a new trial to be granted on account of the discovery of new evidence has, therefore, been fenced round with many limitations. Thus, the party asking for a new trial must show that there was no remissness on his part in adducing all possible evidence at the trial (2). Further, the new evidence must be such as is presumably to be believed and such that if adduced, it would practically be conclusive, i.e. evidence of such a class as to render it probable almost beyond doubt that the judgment would be different (3). Where it is very doubtful whether the evidence, if produced, would have had any effect on the judgment, there is no ground for review (4).

[81] In considering the exceptional conditions when an appellate court would be willing to admit additional evidence, our Federal Court in *Mohamed bin Jamal v Public Prosecutor* [1964] MLJ 254 applied the same principles mentioned in *R v Parks* (see also *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 and *Asiatic Development Bhd & Anor v Balachandar a/l Palanysamy* [1995] 3 MLJ 445).

[82] Reverting to the application before us the facts revealed that the new evidence mentioned in para 17 of the applicant's affidavit is not evidence that was not available at the trial. As a matter of fact the applicant was fully aware of the existence of such evidence. The charges faced by the applicant was one of abuse of power under s 2(1) of Ordinance 22 of 1970. The said new evidence was available during the trial itself. More importantly the learned trial judge had rejected this evidence as being irrelevant. The Court of Appeal and the Federal Court upheld his finding. As they have no relevance to the charges faced by the applicant, we cannot see how they can materially affect the result of the case.

[83] Under the circumstances, we find that the two issues raised in para 17 of the applicant's affidavit do not meet the conditions or principles mentioned in *R v Parks* or *Mohamed Jamal v Public Prosecutor.* That being so they do not qualify as new or additional evidence.

[84] In *Lo Fat Thjan & Ors v Public Prosecutor* [1968] 1 MLJ 274, the Federal Court again had occasion to consider the issue of additional evidence. It was held *per curiam*:

> We would deprecate generally the admission of additional evidence on appeal except in clearly exceptional circumstances. The adversary system in our trials is hardly compatible with allowing *lacunae* in the case of any party to be filled in by afterthoughts or countenancing reconstruction of any case after it has failed at the trial.

[85] It is obvious to us from the above decision that even during an appeal the courts are very strict when admitting additional evidence more so in a situation like ours where the appeal process have already been fully exhausted. The above decision also speaks of exceptional circumstances which we find are totally absent in the present application. The issues raised by the applicant are all issues that could have been obtained during the trial and will not materially affect the result of the trial had it been brought up for consideration.

[86] We take the view that by introducing such evidence, the applicant is seeking to reopen, re-examine and review the decision which has been conclusively decided by the final court of justice. The issues raised by the applicant cannot be viewed as a ground to invoke r 137. In essence, it is an attempt to persuade this court to accept the purported new evidence with a view to relitigate the appeal. As we have said earlier they are not evidence relevant to the charge and they do not qualify to be new evidence before the court. We feel that the purported new evidence ought to have been contemplated by the applicant's able defence team during the trial itself. The purported new evidence was available to the applicant's defence team even while the trial was going on.

[87] The allegation of misapprehension of facts against the trial judge is not new evidence but is an issue that goes to the merits of the case and should have been canvassed throughout the appeal process. Even if the purported misapprehension was a ground of appeal, it does not lend any weight against the charges as they were one of corruption and not relating to misconduct with women.

[88] Finally, we would say that there is no fraud or suppression of evidence and neither is there new evidence before the court which merits the court to entertain a reopening or rehearing of the case.

[89] We shall now proceed to consider encl 97(a).

[90] By way of encl 97(a) the applicant applies for an order that he be given leave to rely on additional grounds at the hearing of his notice of motion (encl 80(a)) for an order that this honourable court invoke its inherent powers under r 137 of the RFC and set aside the convictions and sentences of the applicant that were confirmed and upheld by the Federal Court on 10 July 2002.

[91] The additional grounds appear in the affidavit in support of this application. They are as follows:

(1) The Federal Court's decision handed down on 10 July 2002 is in infringement of the provisions of s 94(2) of the CJA;

(2) The Federal Court was wrong in not directing its mind to the fact that the Court of Appeal did not have the opportunity of considering the remarks directed by the Federal Court in *Zainur Zakaria v Public Prosecutor* [2001] 3 MLJ 604 against the learned trial judge Augustine Paul J and their effect on the trial subsequently thereby depriving the appellant an opportunity for that court to rule on the vital consideration as to the learned trial judges' suitability to have continued with the trial to its conclusion;

(3) The Federal Court was wrong in not directing its mind to the fact that the remarks passed by the Federal Court in Zainur Zakaria's appeal amounted in substance to ruling that the learned trial judge had infringed the provision of r 3(1)(d) of the Judges' Code of Conduct 1994 which states:

> A Judge shall not conduct himself dishonestly or in such manner as to bring the Judiciary into disrepute or to bring discredit thereto' and had thereby disqualified himself from conduct of the appellant's trial

(4) The Federal Court was wrong in considering the remarks passed against the learned trial judge in Zainur Zakaria's appeal in isolation when the proceedings to commit Zainur Zakaria for contempt of court were irretrievably linked to the appellant's trial which became hopelessly contaminated by the role played by the learned trial judge in those proceedings, particularly when considered in the light of the learned trial judge's belligerent stance, convicting and sentencing Zainur Zakaria to three month's imprisonment, an attempt to cite the entire defence team for contempt of court and general bias against the defence; and

(5) The Federal Court was wrong in not considering the appellant's trial was so fatally flawed by the bias shown by the learned trial judge which was so serious that the proviso to s 92 of the CJA could not under the circumstances be invoked.

[92] I will not consider the first ground as the matter had been dealt with by my learned sister earlier.

[93] In considering the remaining additional grounds mentioned above it is appropriate that we refer to the relevant part of the judgment of the Federal Court reported in [2002] 3 MLJ 193 concerning the matter.

[94] At p 222H, this is what the court said:

> We are of the view that the facts and circumstances of Zainur Zakaria cannot be equated to the facts of this case. There it was more towards the conduct of Zainur Zakaria that the learned judge was more concerned with. From what we can gather from the record, it was the learned judge's belief that Zainur Zakaria's action was to delay the proceedings and to sensationalize the trial by alleging on the conduct of the two prosecutors to fabricate evidence against the appellant. The conduct of the learned judge in Zainur Zakaria is not really relevant to the amended charges faced by the appellant. In addition thereto, there was the allegation of lack of time given for Zainur Zakaria to prepare his defence. The learned judge might well appear to lean towards the prosecution as indicated by the Federal Court but he cannot be said to be showing the same inclination on the evidence in the trial against the appellant. A good illustration is where as we stated earlier, he considered the appellant's case at length.

[95] Further at p 223, the court continued:

> Mr Christopher Fernando submitted that there were threats of contempt against counsel including himself by the learned judge. We have examined Mr Christopher Fernando's complaint but regret to say that the learned judge, being human himself, and as stated earlier, because of the wide publicity given to this case, he had to exercise a lot of restraints in controlling the proceedings and in doing so he may have uttered harsh words or even threaten counsel with contempt and all these must be taken in that spirit. It is not so much of the learned judge leaning towards the prosecution or being prejudiced towards the defence. He has the statutory duty to see that irrelevant and inadmissible evidence is not allowed to creep in or for that matter stop counsel from challenging his rulings as otherwise the proceedings will go haywire.

[96] Reading the excerpts from the judgment quoted above we are of the view that the court had embarked upon a full and proper consideration of the effect of the decision in *Zainur Zakaria* in the appeal before it. The court had categorically stated that the facts and circumstances of *Zainur Zakaria* cannot be equated with the facts of the applicant's case. The court also retorted by saying that the conduct of the learned judge in *Zainur Zakaria* is not really relevant to the amended charges faced by the applicant. We would add by saying that the contempt proceedings is a separate proceedings altogether. It was only against Zainur Zakaria and not the whole of the defence team. There is no nexus between the allegation of fabrication and the corruption appeal. The allegation was on fabrication of evidence in trying to get Datuk Nallakaruppan to cooperate by giving evidence on the applicant's sexual

misconduct with women. Whereas the charges in the corruption trial are that he abused his position in getting the police to obtain retraction letters from two individuals. Sexual misconduct is not an ingredient of the charges. None of the prosecution witnesses in the corruption trial made any reference to Datuk Nallakaruppan's role whatsoever.

[97] The Federal Court also referred to the complaint raised by the applicant's counsel that their submission on the conduct of the learned judge in the Court of Appeal was brushed aside by them. The court had examined the judgment of the Court of Appeal and agreed that there was an omission on their part to consider this issue. Nonetheless, the court itself had considered this point and came to the conclusion that it had not occasioned any miscarriage of justice (see p 224).

[98] The Federal Court in its judgment also considered the paramount question raised by the applicant whether the conduct of the trial judge which the applicant said was grossly unfair towards him has occasioned any miscarriage of justice which entitled him to an acquittal.

[99] This is what the court said (at pp 224G, 225B and 226C):

> On this issue, we are guided by s 92(1) of the Courts of Judicature Act 1964 in particular the proviso to s 92(1) which reads:
>
> > 'Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellants, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.'

[100] In addition to the above, we have s 167 of the Evidence Act 1950 that works in tandem with the proviso to s 92(1) of the CJA. It reads:

> The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

[101] The two provisions set out above had recently been considered by the Court of Appeal in the famous case of *Juraimi bin Husin v PP and Mohd Affandi bin Abdul Rahman & Anor v PP* [1998] 1 MLJ 537.

[102] The Court of Appeal thereafter concluded at p 587 thus:

> To summarize the authorities cited, if in a criminal appeal an appellant has demonstrated errors in point of evidence or procedure, it is the duty of this court to determine whether, despite the error or errors in question, there exists a reasonable doubt in its mind as to the guilt of the accused, based upon the admissible evidence on the record. If the error or errors complained do not have this effect, then it is our duty to plainly say so and maintain the conviction.
>
> The judgment of the Court of Appeal was affirmed by the Federal Court though no written grounds were made.

[103] Having said the above, the court finally concluded by saying:

> We have examined the record of the proceedings and the grounds of judgment of the learned judge as closely as we can and the grounds of judgment of the Court

of Appeal in subsequently affirming the conviction of the appellant by the learned judge. We are satisfied that the errors complained of have not occasioned a substantial miscarriage of justice and we have to plainly say so and to uphold the conviction.

[104] In view of what we have said above, we cannot see how it can be said that the judgment of the Federal Court suffered the infirmities as alleged in the additional grounds relied by the applicant. We also fail to see how the Federal Court's decision can be said to have irregularities under the CJA as alleged.

[105] We would reiterate that the findings and observations in the Federal Court pertaining to Zainur Zakaria's contempt proceedings have no bearing at all on the corruption appeal. By introducing new grounds, it is an attempt on the part of the applicant to try to relitigate the issues which have been conclusively settled.

[106] On the issue of relitigation, it is useful to rely on the *dicta* of Eusoffe Abdoolcader FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 where the learned judge said (at p 271):

> … This attempt to relitigate and reopen an issue conclusively decided in respect of the same proceedings and between the same parties would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police & Ors* [1982] AC 528, 542 which was applied by this court in *Tractors Malaysia Bhd v Charles Au Yong* [1982] 1 MLJ 320, 321.

[107] Rule 137 of the Rules of the Federal Court 1995 allows the Federal Court to exercise its inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The rule has been invoked by the Federal Court in a number of cases like *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1 and *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673. However, it must be observed that its application was only in limited circumstances. If there were to be a liberal application of r 137 then there would be chaos to our system of judicial hierarchy. Hence, we would think that it is on a case by case basis. Certainly it cannot be the intention of the legislature when promulgating r 137 that every decision of this court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final.

[108] My learned brother Abdul Malek Ahmad PCA and my learned sister Siti Norma Yaakob FCJ have seen this judgment in draft and have expressed their agreement with it. Similarly, I have had the advantage of reading their respective judgments and totally agree with the reasoning and conclusions, therein.

[109] Finally, having given our utmost consideration to all the four applications before us we find that there are no merits to invoke the exercise of our inherent powers under r 137.

[110] In the result, all the four applications, ie encls 80(a), 89(a), 97(a) and 124(a) are hereby dismissed.

Applications dismissed.

Reported by I Izzuddin